(8) (7)

Nos. 04-104 & 04-105

Supreme Court, U.S.
FILED
SEP 9 - 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, *Petitioner*,
v.
FREDDIE J. BOOKER, *Respondent*,

UNITED STATES OF AMERICA, *Petitioner*
v.
DUCAN FANFAN, *Respondent*

On Writ of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

---

BRIEF OF THE FEDERAL PUBLIC DEFENDER, NORTHERN DISTRICT OF TEXAS, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

IRA R. KIRKENDOLL
Federal Public Defender
Northern District of Texas
Counsel of Record
525 S. Griffin St., Suite 629
Dallas, Texas 75202
214.767.2746

DOUGLAS A. MORRIS and
CARLOS R. CARDONA
Assistant Federal Public Defenders, and
K. JOEL PAGE
Research & Writing Attorney

Counsel for Amicus Curiae

BEST AVAILABLE COPY

QUESTION PRESENTED

Other than the fact of a prior conviction, can a defendant's mere admission of facts function as a waiver of constitutional rights, which would then allow a court to use those facts to increase the sentence beyond the relevant statutory maximum sentence that the indictment supports?

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES ..... iv-vii

INTERESTS OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3-13

I. Other than the fact of a prior conviction, can a defendant's mere admission of facts function as a waiver of constitutional rights, which would then allow a court to use those facts to increase the sentence beyond the relevant statutory maximum sentence that the indictment supports?

CONCLUSION 13-15

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 3-6, 13

Apprendi v. New Jersey,
530 U.S. 466 (2000) 3-5, 9, 13

Blakely v. Washington,
124 S. Ct. 2531 (2004) ..... passim

Bousley v. United States,
523 U.S. 614 (1998) 6

Boykin v. Alabama,
395 U.S. 238 (1969) 6, 7, 9, 14

Brady v. United States,
397 U.S. 742 (1970) 8

Carnely v. Cochran,
369 U.S. 506 (1962) 6

Commonwealth ex. rel. West v. Rundle,
237 A.2d 196 (Pa. 1968) 14

Cordova v. Hood,
84 U.S. 1 (1873) 6

De Jonge v. Oregon,
299 U.S. 353 (1937) 9

Diaz v. United States,
223 U.S. 442 (1912) 3-4

Dretke v. Haley,
124 S. Ct. 1847 (2004) 5

Duncan v. Louisiana,
391 U.S. 145 (1968) 3

Hamdi v. Rumsfield,
124 S. Ct. 2633 (2004) (plurality) 9

In re Winship,
397 U.S. 358 (1970) 5, 9

Iowa v. Tovar,
124 S. Ct. 1379 (2004) 3

Johnson v. Zerbst,
304 U.S. 458 (1938) ..... passim

Jones v. United States,
526 U.S. 227 (1999) 4, 5, 9

Libretti v. United States,
516 U.S. 29 (1995) 7

McCarthy v. United States,
394 U.S. 459 (1969) 7

Patton v. United States,
281 U.S. 276 (1930),
overruled on other grounds by,
Williams v. Florida, 399 U.S. 78 (1970) 3

Ring v. Arizona,
536 U.S. 584 (2002) 5

United States v. Broce,
488 U.S. 563 (1989) 7

United States v. Cotton,
535 U.S. 625 (2002) 9

United States v. Mezzanatto,
513 U.S. 196 (1995) 3

United States v. Ruiz,
536 U.S. 622 (2002) 8

United States v. Vonn,
535 U.S. 55 (2002) 9

Woodward v. State,
171 So. 2d 462 (1965) 7

Rules

Fed. R. Crim. P. 7 (2004) 3

Fed. R. Crim. P. 11 (1966) 7

Fed. R. Crim. P. 11 (2004) 8-10, 12

Sup. Ct. R. 37.1 (2004) 2

Sup. Ct. R. 37.6 (2004) 1

Other Authorities

Sharon M. Bunzel, The Probation Officer
and the Federal Sentencing Guidelines:
Strange Philosophical Bedfellows,
104 Yale L.J. 933 (Jan. 1994) 11

Gary M. Maveal, Articles:
Federal Presentence Reports:
Multitasking at Sentencing,
26 Seton Hall L. Rev. 544 (1996) 11

United States Department of Justice,
Compendium of Federal Justice Statistics,
2001 (Nov. 2003) 10

United States Sentencing Commission,
2002 Sourcebook of
Federal Sentencing Statistics, (2002) 10, 14

Jack B. Weinstein, Symposium on
Federal Sentencing: Comment:
A Trial Judge's Second Impression
of the Federal Sentencing Guidelines,
66 S. Cal. L. Rev. 357 (Nov. 1992) 11

INTERESTS OF AMICUS CURIAE

The Office of the Federal Public Defender, Northern District of Texas, provides legal representation to over a thousand indigent individuals each year who the government has charged with violating federal criminal statutes.[1] In the end, the vast majority of our clients decide that it is in their best interest to plead guilty and are subject to the Federal Sentencing Guidelines. Accordingly, this Office has a very high interest in the outcome of this case. This Office determined that it would be in its clients' best interests to address the issue of whether a simple admission of facts, other than the fact of a prior conviction, can function as a waiver of constitutional rights. It appears from the caselaw, commentary, and the known positions of the parties that this important issue will not be addressed. With that said, the Office of the Federal Public Defender, Northern District of Texas, respectfully submits this amicus curiae brief in support of the Respondents.

---

1 Letters of consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amicus curiae states that no counsel for a party authored any part of this brief, and no person or entity, other than amicus curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court's precedent and the Federal Rules of Criminal Procedure weigh heavily against allowing a defendant's simple admission of facts, which increase the relevant statutory maximum sentence, to constitute an adequate waiver of constitutional rights.

This Court has held, however, that a defendant can waive constitutional rights, such as the bundle of rights referred to as *Apprendi rights*. Accordingly, a valid waiver of *Apprendi rights* would allow a sentencing court to make a factual determination that may result in a defendant receiving a sentence beyond the relevant statutory maximum sentence that the indictment supports.

Because Respondents and others will thoroughly argue that Blakely v. Washington, 124 S. Ct. 2531 (2004), applies to the Federal Sentencing Guidelines and that the Guidelines remain valid, this brief will not waste this Court's time by restating these same arguments. See Sup. Ct. R. 37.1 (2004).

ARGUMENT

I. Blakely and Waivers by Admission

A. *Almendarez-Torres v. United States, 523 U.S. 224 (1998) is the basis to the idea that a simple admission of facts allows a court to exceed the statutory maximum sentence.*

In what is arguably *dictum*, this Court stated that a defendant may waive his Apprendi rights by admitting facts. See Blakely, 124 S. Ct. at 2537. Specifically, "[w]hen a defendant pleads guilty, the [government] is free to seek *judicial sentence enhancements* so long as the defendant *either stipulates* to the relevant facts *or consents* to judicial factfinding." Id. at 2541 (emphasis added) (citing Apprendi v. New Jersey, 530 U.S. 466, 488 (2000); Duncan v. Louisiana, 391 U.S. 145, 158 (1968)). It is clear that a defendant may waive, *inter alia*, constitutional and statutory rights. See Fed. R. Crim. P. 7(b) (2004);[2] see also Iowa v. Tovar, 124 S. Ct. 1379, 1387-90 (2004); United States v. Mezzanatto, 513 U.S. 196, 200-11 (1995); Johnson v. Zerbst, 304 U.S. 458, 465 (1938);[3] Patton v. United States, 281 U.S. 276, 312-13 (1930),[4] overruled on other grounds by, Williams v. Florida, 399 U.S. 78, 90-94, 102-03 (1970); Diaz v. United

---

2 This notes the ability to waive the right to an indictment.

3 Approving the waiver of the right to counsel.

4 Approving the waiver of the right to a jury trial.

States, 223 U.S. 442, 450-53 (1912).[5] However, the waiver-by-admission language in Blakely is inconsistent with this Court's precedent.

To support the proposition that a defendant may waive constitutional rights by simply admitting facts that increase the relevant statutory maximum sentence, Blakely cited a specific page in Apprendi that discussed Almendarez-Torres v. United States, 523 U.S. 224 (1998). Blakely, 124 S. Ct. at 2541 (citing Apprendi, 530 U.S. at 488). It cannot be denied, however, that Almendarez-Torres dealt only with the situation where a defendant admits to the fact of a prior conviction and not to facts that increase the relevant statutory maximum sentence. See Apprendi, 530 U.S. at 487-88; cf. Blakely, 124 S. Ct. at 2541.

Moreover, Almendarez-Torres represents an "exceptional departure from the historic practice" of requiring the government to include in the indictment those facts, *other than the fact of a prior conviction*, that increase the statutory maximum sentence of imprisonment. See Apprendi, 530 U.S. at 487-88. The reasons for this "exceptional departure" are that a defendant with a prior conviction is presumed to have enjoyed the full panoply of constitutional rights during the previous proceedings and that the courts of this country have traditionally treated recidivism as a sentencing factor.[6]

---

5 Approving the waiver of the right to confrontation.

6 "[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." Jones v. United States, 526 U.S. 227, 249 (1999). "The majority and the dissenters in *Almendarez-Torres*

See Apprendi, 530 U.S. at 487-88; Jones v. United States, 526 U.S. 227, 248-49 (1999); see generally Dretke v. Haley, 124 S. Ct. 1847, 1853-54 (2004); Ring v. Arizona, 536 U.S. 584, 602-09 (2002).

In sum, neither Almendarez-Torres nor Apprendi condoned a defendant waiving constitutional rights simply by admitting essential facts that would result in an increase in the relevant statutory maximum sentence, but that are not related to the fact of a prior conviction. Thus, this Court has not sanctioned such a "waiver" and it cannot reasonably be argued that a defendant can waive *Apprendi rights* by simply admitting those facts, unrelated to a prior conviction, that *increase* the defendant's relevant statutory maximum sentence. Cf. Apprendi, 530 U.S. at 488; Jones, 526 U.S. at 249; In re Winship, 397 U.S. 358, 364 (1970); Johnson, 304 U.S. at 465.[7]

---

disagreed over the legitimacy of the Court's decision to restrict its holding to recidivism, but both sides agreed that the Court had done just that." Id. at 249, n10.

7 This is not to say that a defendant cannot waive or stipulate to those facts that are only relevant to the defendant's guilt, innocence, or sentence within the *relevant statutory maximum sentence*; however, such a waiver or stipulation is not so easily given when the facts are used to increase the relevant statutory maximum sentence. Cf. Blakely, 124 S. Ct. 2537; Apprendi, 530 U.S. at 490.

B. *The requirements for a valid waiver*

It is beyond peradventure that a mere factual admission does not fulfill the requirements of a voluntary and knowing waiver of *Apprendi rights*. Cf. Bousley v. United States, 523 U.S. 614, 618 (1998); Johnson, 304 U.S. at 464-65; Cordova v. Hood, 84 U.S. 1, 7 (1873).[8] For nearly 70 years Johnson has held that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights . . . and that we 'do not presume acquiescence in the loss of fundamental rights.' . . . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson, 304 U.S. at 464 (citations omitted). With that, how can it be said that a defendant's simple admission of facts not included in the indictment can serve as a knowing and voluntary waiver of constitutional rights, a waiver that then allows a court to increase the relevant statutory maximum sentence, *i.e.*, sentence the defendant to an additional term of imprisonment for uncharged conduct? It cannot.[9]

8 A "[w]aiver is a thing of intention as well as of action." Cordova, 84 U.S. at 7.

9 The Court has clearly held that "'[p]resuming waiver from a silent record is impermissible.'" Boykin v. Alabama, 395 U.S. 238, 242 (1969) (quoting Carnely v. Cochran, 369 U.S. 506, 516 (1962)). Indeed, a simple admission does not "speak" to whether the person has knowingly and voluntarily waived their constitutional rights. Cf. Boykin, 395 U.S. at 242-43.

It is no good to say that the defendant's guilty plea can "subsidize" a defendant's admission such that the admission would fulfill the requirements of a waiver of constitutional rights. A "guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law *in relation to the facts*." McCarthy v. United States, 394 U.S. 459, 466 (1969) (emphasis added); see United States v. Broce, 488 U.S. 563, 570 (1989). Because the guilty plea is directly related to *conduct that the government includes in the indictment*, the trial "judge must determine 'that the *conduct* which the defendant admits constitutes the offense *charged in the indictment* or information or an offense included therein to which the defendant has pleaded guilty.'" McCarthy, 394 U.S. at 467 (emphasis added) (quoting Fed. R. Crim. P. 11, Notes of Advisory Committee on Criminal Rules (1966)); see Libretti v. United States, 516 U.S. 29, 38 (1995); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).[10]

Accordingly, a court cannot piggyback a defendant's admission of facts that increase the relevant statutory maximum sentence onto a plea of guilty; the admitted conduct was not included in the indictment or information and cannot be used, absent a sufficient waiver, to increase a defendant's relevant statutory maximum sentence. Cf. Boykin, 395 U.S. at 242-43; McCarthy, 394 U.S. at 466. Moreover, if allowed, there would be no guarantee that the defendant was aware of his rights to a jury trial and proof beyond a reasonable doubt with regard to the facts that

10 A "plea of guilty is *more than an admission of conduct*; it is a conviction." Boykin, 395 U.S. at 242 (emphasis added) (citing Woodward v. State, 171 So. 2d 462, 469 (Ala. 1965)).

increase the relevant statutory maximum sentence. Cf. Johnson, 304 U.S. 464-65.[11]

C. *Federal Rule Criminal Procedure 11*

The Rules of Federal Criminal Procedure provide further support for the contention that simple admissions are insufficient to waive constitutional and statutory rights. See

---

11 That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts *charged in the indictment*. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so– hence the minimum requirement that his plea be the voluntary expression of his own choice. . . . . But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial-- a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Brady v. United States, 397 U.S. 742, 748 (1970) (emphasis added) (citations omitted); see United States v. Ruiz, 536 U.S. 622, 628-29 (2002).

Boykin, 395 U.S. at 243, n.5; Fed. R. Crim. P. 11(b) (2004).[12] Rule 11(b) clearly outlines the proper method for receiving a defendant's waiver of rights during a guilty plea. Fed. R. Crim. P. 11(b). Rule 11(b) includes a plethora of constitutional and statutory rights that a sentencing court must address. Id.[13] The fact that Rule 11(b) requires a sentencing court to personally address the defendant and ensure that the defendant knows what rights are being waived and that the waiver is voluntary provides a strong argument that a simple admission of facts cannot be used against the defendant to increase the relevant statutory maximum sentence. See id.

In fact, as a matter of practice, no federal judge would take a guilty plea based solely on a defendant's factual admission. Cf. De Jonge v. Oregon, 299 U.S. 353, 362 (1937). Before taking a guilty plea, sentencing judges ensure that a defendant knows and understands his constitutional and statutory rights and knowingly and voluntarily waives such rights. See Fed. R. Crim. P. 11(b). Judges ensure that all of this has occurred by conducting a colloquy pursuant to Fed.

---

12 "Rule 11 of the Federal Rules of Criminal Procedure requires a judge to address a defendant about to enter a plea of guilty, to *ensure that he understands the law of his crime in relation to the facts of his case*, as well as his rights as a criminal defendant." United States v. Vonn, 535 U.S. 55, 62 (2002) (emphasis added).

13 Because Rule 11(b) does not address all of the *Apprendi rights*, a colloquy based solely on the current version of Rule 11(b) is inadequate. Compare Fed. R. Crim. P. 11(b) to Hamdi v. Rumsfield, 124 S. Ct. 2633, 2646-49 (2004) (plurality); United States v. Cotton, 535 U.S. 625, 627 (2002); Apprendi, 530 U.S. at 482-84, 490, n.15; Jones, 526 U.S. at 243, n.6; In re Winship, 397 U.S. at 364.

R. Crim. P. 11(b). See id. A mere admission of facts is clearly insufficient. See id.; cf. Johnson, 304 U.S. at 464.

IV. Redeeming Waivers by Admission

In fiscal year 2001, the government prosecuted 82,614 defendants: 89% of these were convicted. United States Department of Justice, Compendium of Federal Justice Statistics, 2001, at *55 (Nov. 2003). Of the convicted, 95% pleaded guilty and 5% lost at trial. Id. (Figure 4.1). Of the remaining 11% of defendants who were not convicted, the government dismissed the charges against the vast majority; statistically, it appears that only 10% of the remaining 11% of defendants went to trial and won. See id.; cf. United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, at *20 (2002) (Figure C). It is clear from these numbers that nearly all of the people that the government pursues charges against will have the Federal Sentencing Guidelines applied to their case.

It is common knowledge that these legions of defendants who plead guilty, must, as part of the plea colloquy, admit facts related to the charged offenses. On some occasions the admissions are strictly limited to the charged offense and specifically track the indictment. On many other occasions, however, the admissions include facts that go well beyond the elements of the offenses that Congress has prescribed.[14]

---

14 Beyond these admissions are the "facts" that a probation officer gleans from various "sources" that also increase the relevant statutory maximum sentence. For defendants, defense attorneys, and some prosecuting attorneys, this is one of the most aggravating

---

aspects of the Federal Sentencing Guidelines. The Guidelines allow a probation officer to "investigate" and then include "facts" that result in surprise enhancements in the Presentence Report that neither the government nor the defendant expected. It is heartening to read that this Court understands this problem:

> Any evaluation of Apprendi's 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon . . . based not on facts proved to his peers beyond a reasonable doubt, *but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.*

Blakely, 124 S. Ct. at 2542 (emphasis added).

It is also clear that probation officers periodically act as quasi-prosecutors by making legal arguments to increase a defendant's statutory maximum sentence. See Sharon M. Bunzel, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 104 Yale L.J. 933, 961-65 (Jan. 1994). Even worse, probation officers are sometime seen as the "Pinocchios in the hands of prosecutorial Geppettos." The Honorable Jack B. Weinstein, United States District Judge, Symposium on Federal Sentencing: Comment: A Trial Judge's Second Impression of the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 357, 360 (Nov. 1992); see also Gary M. Maveal, Articles: Federal Presentence Reports: Multitasking at Sentencing, 26 Seton Hall L. Rev. 544, 567-96 (1996).

In those instances, if Blakely applies to the Federal Sentencing Guidelines and the Guidelines remain valid, a defendant can admit facts that would allow the sentencing court to increase the defendant's sentence beyond the relevant statutory maximum sentence that the indictment supports. Again, Johnson and its progeny pellucidly hold that in order for the admission to act as a valid waiver of rights, the government must procure a sufficient waiver as part of a plea agreement that would then allow the sentencing court to make a factual determination based on those admitted facts; the sentencing court must then perform a proper plea colloquy informing the defendant of the waiver of constitutional rights regarding those specific factual admissions. Cf. Johnson, 304 U.S. at 464-65; Fed. R. Crim. P. 11.

Admittedly, the admission and adequate waiver become problematic in the arena of one-count indictments that do not include "specific offense characteristics." If a single count formed the sum total of the defendant's criminal conduct, the defendant would have no incentive to increase the relevant statutory maximum sentence. The government

---

In a defense attorney's eyes, the best result of applying Blakely to the Federal Sentencing Guidelines will be reducing a probation officer's impact in determining the offense-level and allowing the prosecuting and defense attorneys to come to an agreement as to a defendant's "enhancements" and relevant statutory maximum sentence. When this occurs, a defendant will truly know what offense level he or she is bargaining for and then we can all truthfully say that the defendant has knowingly and voluntarily waived constitutional rights.

could resolve this, however, by superceding the indictment to include the guideline "elements" or by offering the defendant some consideration for admitting the facts and signing an adequate waiver.

In a multi-count indictment, this is less of a problem. In such a case, the defendant usually receives some consideration for the guilty plea in the form of a reduction in charges, which usually results in a lower guideline range. As part of the bargain, the government could insist that the defendant admit specific facts that will increase the relevant statutory maximum sentence and further insist that the defendant sign a waiver of constitutional rights related to the specific admitted facts and subsequent sentence.

CONCLUSION

Blakely, citing Apprendi, discussing Almendarez-Torres does not support the proposition that a defendant can waive constitutional rights by simply admitting facts, which are not facts related to a prior conviction, that increase the relevant statutory maximum sentence. Any such statement is contrary to this Court's precedent. The defendant, however, can admit facts in conjunction with a valid waiver of enumerated rights that will allow the judge to increase the relevant statutory maximum sentence. As part of this procedure, the sentencing court must fully inform the defendant of the rights being waived and the results of such a waiver. Only then will a defendant knowingly and voluntarily have waived constitutional and statutory rights.[15]

---

15 'A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be

Cf. Boykin, 395 U.S. at 242-244; Johnson, 304 U.S. at 464.

The bottom line is that the application of Blakely to the Federal Sentencing Guidelines, when combined with *admitted facts and valid waivers*, will result in defendants actually receiving the guideline range that they bargained for: this would be real "truth in sentencing."[16]

> insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include . . . an attempt to satisfy itself that the defendant understands the nature of the charges, his right[s] . . . , *the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences.*'

Boykin, 395 U.S. at 244, n.7 (emphasis added) (quoting Commonwealth ex. rel. West v. Rundle, 237 A.2d 196, 197-98 (Pa. 1968)).

16 The Sentence Commission notes that 47.9% of its 6,290 appeals before the Circuit Courts of Appeal, which is 3,014 appeals, were filed strictly for perceived sentencing errors. Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, at *101 (2002) (Table 55). It cannot be denied that giving the defendant the sentence bargained for would dramatically reduce the number of appeals, thus saving significant judicial resources.

Respectfully submitted,

Ira R. Kirkendoll
Counsel of Record
Federal Public Defender
Northern District of Texas
525 Griffin Street, Suite 629
Dallas, Texas 75202
214.767.2746

Douglas A. Morris
Assistant Federal Public Defender

Carlos R. Cardona
Assistant Federal Public Defender

K. Joel Page
Research and Writing Attorney

Counsel for the Amicus Curiae